

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

IN RE LOESTRIN 24 FE ANTITRUST
LITIGATION

THIS DOCUMENT RELATES TO:
All Actions

MDL No. 2472

Master File No.: 1:13-md-2472-S-PAS

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
TO EXCLUDE IN PART THE EXPERT OPINIONS OF CHRISTINE S. MEYER**

TABLE OF AUTHORITIES

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MEMORANDUM

Plaintiffs move to exclude Warner Chilcott's expert, Dr. Christine Meyer's "commercial success" opinion.¹

In theory, an opinion about whether Loestrin 24 was commercially successful at the time of the Warner Chilcott-Watson litigation could be relevant to understanding the patent merits in that case. One way to rebut a finding that a patent is obvious is to identify so-called secondary considerations of non-obviousness (such as commercial success).² But Dr. Meyer's opinion is neither reliable nor helpful on this issue.

First, Dr. Meyer admits that she has "not performed an independent analysis of commercial success." Instead, she read and summarized the expert reports of two opposing experts in a later-in-time patent infringement suit between different parties (Warner Chilcott and generic company Mylan).³ Unsurprisingly, given who pays her here, Dr. Meyer opines that Warner Chilcott's expert's approach was "generally reasonable."⁴ But "[m]erely to have partisan experts appear to vouch for previous experts violates Fed.R.Evid. 403."⁵ While Rule 703 liberalizes the rules on hearsay and expert testimony, "it was not intended to abolish the

¹ Expert Report of Christine S. Meyer, dated February 14, 2019 ("Meyer Rpt."), attached hereto as Exhibit 1; Meyer Rpt. pp. 103-112 (section XII, ¶¶ 204-225).

² Importantly, "secondary factors" such as commercial success are limited to rebutting a prima facie case on obviousness, and cannot overcome a finding of inequitable conduct or fraud on the PTO. *See, e.g., Bristol-Myers Squibb Co. v. Teva Pharm. USA, Inc.*, 923 F. Supp. 2d 602, 652 (D. Del. 2013), *aff'd*, 752 F.3d 967 (Fed. Cir. 2014) (considering evidence of "secondary considerations" with respect to obviousness inquiry, but not with respect to inequitable conduct allegations).

Bristol-Myers Squibb Co. v. Teva Pharm. USA, Inc., 923 F. Supp. 2d 602, 652 (D. Del. 2013), *aff'd*, 752 F.3d 967 (Fed. Cir. 2014)

³ Dr. Meyer reviewed the expert reports of two opposing experts in the Warner Chilcott versus Mylan patent litigation from 2013 – Mr. Sims (who offered an opinion on behalf of Warner Chilcott) and Mr. Gleason (on behalf of Mylan).

⁴ Meyer Rpt. ¶ 225.

⁵ *Tunis Bros. Co. v. Ford Motor Co.*, 124 F.R.D. 95, 98 (E.D. Pa. 1989) ("It is the jury's function to determine the validity of Mr. Oxman's opinions and not to judge Dr. Kursh's opinions of Mr. Oxman's opinions.").

hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion.”⁶ Furthermore, there is the concern that “the expert’s stamp of approval on a particular witness’ testimony may unduly influence the jury.”⁷

Second, Dr. Meyer did not even form her own opinions about the data relied on, or the analysis of that data, presented by Warner Chilcott’s and Mylan’s respective experts. Rather, she took those expert’s “analyses and the data they relied on as a given.”⁸ So whatever she is doing in purporting to “evaluate” those opinions does not satisfy the rigorous standards of *Daubert*.⁹

Third, and perhaps most importantly, Dr. Meyer’s opinion is irrelevant to understanding the patent merits in the *Watson* lawsuit, the patent infringement action that undergirds (some of) the purchasers’ antitrust claims. The relevant question is whether Loestrin 24 was commercially successful in 2009 – at the time that Warner Chilcott and Watson were taking discovery. By the time of the expert opinions in the Mylan suit, Loestrin 24 had been on the market for an additional four years and yielded hundreds of millions of dollars more in revenue. Looking at the sales volume years after discovery closed in the *Watson* litigation improperly bolsters any

⁶ *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794, 808 (N.D.Ill.2005); see also *Deutz Corp. v. City Light & Power, Inc.*, No. 1:05-CV-3113-GET, 2009 WL 2986415, at *6 (N.D. Ga. Mar. 21, 2009) (“While Rule 703 permits an expert to rely on ‘facts or data’ that are not otherwise admissible into evidence in forming his opinion, it does not permit an expert to simply parrot the opinions of other experts.”) (citation omitted).

⁷ *United States v. Vest*, 116 F.3d 1179, 1185 (7th Cir.1997) (quotations omitted).

⁸ Meyer Rpt. ¶ 205. See also ¶ 225 (“As I noted at the outset of this section, I have not undertaken my own commercial success analysis.”)

⁹ See *Bruno v. Bozzut’s, Inc.*, 311 F.R.D. 124, 138 (M.D. Pa. 2015) (“[E]xperts who use data in their reports without independently verifying the accuracy or reliability of those figures fail to satisfy [the] reliability requirement.”).

commercial success retort that Warner Chilcott may have had during the Watson litigation and threatens to lead the jury seriously astray.¹⁰

Essentially, Dr. Meyer is simply reviewing expert reports from another case – not the one at issue in this litigation – and picking which one she believes is more persuasive, which (unsurprisingly) is the one which was sponsored by Warner Chilcott. This is not the proper fodder for expert opinion. Dr. Meyer’s opinions in paragraphs 204-225 of her report should be excluded.

Respectfully submitted,

Dated: May 17, 2019

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¹⁰ Indeed, Dr. Meyer’s report refers to Warner Chilcott’s expert’s “observations” that Loestrin sales grew year over year, such that its sales by 2012 or 2013 were far higher than they were when Warner Chilcott and Watson settled in 2009. *See* Meyer Rpt. at ¶ 212.

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CERTIFICATE OF SERVICE

I, Lauren Ravkind, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's CM/ECF system. Those attorneys who are registered CM/ECF users may access these filings, and notice of these filings will be sent to those parties by operation of the CM/ECF system.

Dated: May 17, 2019

/s/Lauren Ravkind
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EXHIBIT 1

(FILED UNDER SEAL)